IN THE

Supreme Court of the United States

OCTOBER TERM — 1958

No. 378

ANONYMOUS NOS. 6 AND 7,

Appellants,

—against—

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that the question sought to be reviewed was never raised in the New York State Courts and that the question that was raised is not a substantial Federal question.

STATEMENT

This is an appeal from two orders of the Court of Appeals of the State of New York, dated and entered on June 25, 1958, dismissing appellants' appeals from orders of the Appellate Division of the Supreme Court of the State of New

York, Second Judicial Department, dated and entered on May 26, 1958.

The Court of Appeals dismissed appellants' appeals on the ground that no substantial constitutional question was involved.

By order dated January 21, 1957, the Appellate Division directed a judicial inquiry and investigation into alleged unethical practices of attorneys and others acting in concert with them. (A copy of the January 21, 1957 order is appended.) The inquiry is commonly called an "ambulance chasing investigation." Investigations of this type have been conducted, periodically, in various counties within the City of New York. An investigation in the county now involved last took place some 30 years ago. Appellants are not lawyers; they are New York State licensed private detectives and investigators. They were called to testify in the investigation because the investigative staff had information which indicated that appellants were acting in concert with certain attorneys whose conduct was being investigated.

The judicial inquiry and investigation (Judicial Inquiry) was ordered pursuant to Article VI, Section 2 of the New York State Constitution, and Sections 86 and 90 of the New York State Judiciary Law (McKinney's Consolidated Laws of New York, Book 29). For the purpose of conducting the Judicial Inquiry, there was created an Additional Special Term of the Supreme Court of the State of New York, Kings County, and appellee, a Justice of that Court, was designated to preside. The investigation, pursuant to the January 21, 1957 order has been and is now being conducted in private as provided for in Section 90 (10) of the New York State Judiciary Law.

Appellants were called to testify as witnesses in the investigation. Each appellant was examined separately before appellee at the Additional Special Term. During the examination, their attorney, at the direction of appellee, was absent from the hearing room. However, at appellants' request, on

several occasions, the examination was interrupted and appellee allowed appellants to leave the hearing room to seek advice from their attorney who throughout the examination was waiting outside. After receiving advice from their attorney, appellants re-entered the hearing room and the examination was continued in the absence of their attorney. During the examination, appellants refused to answer certain questions on the sole ground that they were being deprived of the right to be represented by counsel while being examined as witnesses. They maintained that this deprivation was violative of the due process clause of the Fourteenth Amendment to the United States Constitution. For their refusal to answer, appellee held them in criminal contempt of court (Section 750 (5) New York State Judiciary Law) and committed them to jail for thirty days (Section 751, New York State Judiciary Law). Appellants have served two days of that sentence. Then they had the contempt orders of the appellee reviewed by the Appellate Division (Section 752, Judiciary Law; Section 1287 of Article 78, New York State Civil Practice Act—Gilbert Bliss Civil Practice Act of New York). The Appellate Division confirmed the contempt orders (*Anonymous No. 6* v. *Arkwright*, 6 App. Div. 2d 719; *Anonymous No. 7* v. *Arkwright*, 6 App. Div. 2d 719). Upon appeal to the Court of Appeals, both appeals were dismissed on the ground that no substantial constitutional question was involved (*Anonymous No. 6* v. *Arkwright*, 4 N. Y. 2d 1034; *Anonymous No. 7* v. *Arkwright*, 4 N. Y. 2d 1034).

ARGUMENT

Appellants bring this appeal under 28 U. S. C., Section 1257 (2) or failing that they pray that their papers be treated as applications for writs of certiorari pursuant to 28 U. S. C. Section 2103 (Jurisdictional Statement, p. 4).

I. As claimed by appellants (Jurisdictional Statement, pp. 5 and 6), there is drawn in question the validity of a New

York State statute (Section 90 (10) Judiciary Law) on the ground of its being repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The appellants now, for the first time, contend that the denial of counsel while being examined as witnesses before appellee at the Additional Special Term is based on Section 90 (10) of the Judiciary Law; that such a denial is violative of the due process clause of the Fourteenth Amendment and that therefore the statute in question is unconstitutional. Appellants, however, contest the validity of that statute for the first time in this Court. The record shows that the question of validity under federal law of the statute was neither presented for decision to the New York State courts nor was it ever decided by them. Before appellee at the Additional Special Term, appellants contended that the denial of the presence of counsel in the hearing room was violative of the Fourteenth Amendment (pp. 49 and 57, transcript of testimony). The same argument was made in the Appellate Division (Bluestein petition, verified April 25, 1958, paragraphs 8 and 12; Percudani petition, verified April 25, 1958, paragraphs 8 and 12), and in the Court of Appeals (Bluestein affidavit, sworn to May 29, 1958, p. 2; Percudani affidavit, sworn to May 29, 1958, p. 2).

Appellants, however, at no time in any of the courts below questioned the validity of Section 90 (10) of the Judiciary Law. Moreover, in none of the New York State courts was the question of the constitutionality of that statute ever presented or passed upon.

Accordingly, appellants have no right to appeal to this Court from the orders of the New York State Court of Appeals. *Wilson* v. *Cook*, 327 U. S. 474, 480, 482.

The Appellate Division disposed of these two matters (6 App. Div. 2d 719) on the authority of *M. Anonymous* v. *Arkwright*, 5 App. Div. 2d 790, leave to appeal denied, 4 N. Y. 2d 676, and *S. Anonymous* v. *Arkwright*, 5 App. Div. 2d 792. Appellants contend that in *M. Anonymous* and *S. Anonymous*, the validity of Section 90 (10) of the Judiciary Law was drawn into question as violative of the due process clause of

the Fourteenth Amendment because it allows for the denial of counsel while a person is being examined as a witness before appellee at the Additional Special Term (Jurisdictional Statement, pp. 3 and 10). They seem to argue that since the question of the validity of Section 90 (10) of the Judiciary Law was raised in *M. Anonymous* and *S. Anonymous*, and since the two instant matters were decided by the Appellate Division on the authority of those two cases, then it must be considered that the same question was raised in the instant matters. This argument is without merit. To begin with, *M. Anonymous* and *S. Anonymous* were in no way involved with the constitutionality of the statute in question. Moreover, even if they were, it avails the appellants nothing. The question, if it is to be reviewable by this Court on appeal, must be raised in the New York State courts in the matter presently before the United States Supreme Court. This has not been done and therefore appellants have no right to appeal to this Court on the question as they have stated it.

II. Appellee concedes, however, that appellants did raise a constitutional question in the New York State courts. That question is: By denying appellants the presence of counsel while being examined as witnesses before appellee at the Additional Special Term, did appellee deprive appellants of a right protected by the due process clause of the Fourteenth Amendment?

Appellee contends that this is not a substantial Federal question.

The principal basis for appellants' contention that they are entitled to be represented by counsel while being examined as witnesses before appellee at the Additional Special Term, is that they are prospective defendants in criminal cases. Thus, they allege that they were "accused of crime" (Jurisdictional Statement, p. 8); that they were in "imminent peril of prosecution for crime." (Jurisdictional Statement, p. 9); that "evidence had already been gathered against them for a *prima facie* case of crime that was ready to be sent to the

District Attorney" (Jurisdictional Statement, pp. 11 and 14). All of these allegations derive from a statement made to appellants by a Judicial Inquiry attorney some four and one-half months before appellants testified. This statement was the personal opinion of the Judicial Inquiry attorney, furnished at appellants' request, and made in the presence of their attorney. (Jurisdictional Statement, pp. 8-9.)

The Judicial Inquiry, as noted, must be conducted in private. Appellee's duty is to preside at the Additional Special Term and at the conclusion of the inquiry report to the Appellate Division the proceedings, his findings and his recommendations. The investigation, which is quasi-administrative in nature, is non-adversary, and by reason of the secrecy injunction of the Appellate Division order of January 21, 1957, its closest analogue is a grand jury proceeding. It will neither end in any decree nor establish any right. See *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479. The Judicial Inquiry can only seek facts and make recommendations based on those facts. No person called as a witness before the Additional Special Term can be charged with unlawful conduct since the appellee has no power to make such charges. See *People ex rel. Karlin* v. *Culkin, supra*, at 468-469. Regardless of what appellants were told by the Judicial Inquiry attorney (Jurisdictional Statement, pp. 8 and 9), they were not and could not be the subject of charges at or by the Additional Special Term. To place them, therefore, in the position of prospective defendants in criminal prosecutions is pure speculation. Appellants conclude that because of the statements made to them by the Judicial Inquiry attorney, they are now prospective defendants and therefore are entitled to the presence of counsel while being examined as witnesses before appellee at the Additional Special Term. As noted, appellants allege that they have been "accused of crime." Of course, this must be taken to mean that they may, at some future time, become defendants in criminal prosecutions; that is, that they are prospectively defendants. They use the phrase, "accused of crime", as a layman would use it. Legally, a person is not "accused of crime" until such time as

the appropriate procedures provided for in the constitutions and statutes in criminal cases have been invoked and properly applied. In the instant matters, this has not been done and therefore appellants, in a legal sense, have not been "accused" of crime."

Whatever denomination may properly be used to describe appellants' capacity when they were before the Additional Special Term, it is clear that they were not entitled to counsel. Along these lines, it would be well to compare the immediacy of appellants' danger of becoming actual defendants with that of the appellants in *Matter of Groban*, 352 U. S. 330. In that case, the appellants were called as witnesses by a Fire Marshal of the State of Ohio in an examination being conducted by him into the causes of a fire.

The Fire Marshal was inquiring into the crime of arson and, according to the unchallenged affidavit of those appellants, he believed that they had started the fire. *Matter of Groban, supra,* at 339. He excluded counsel for appellants while he was examining them and this Court decided that such exclusion was not violative of the due process clause of the Fourteenth Amendment. Actually, the appellants here were in a much better position than the appellants in the *Groban* case. During the examination of appellants before appellee at the Additional Special Term, they could, and did, interrupt the examination and step outside the hearing room to confer with their attorney who was waiting there.

Appellants here were told by a Judicial Inquiry attorney that in his opinion, the evidence discovered against appellants was such as might warrant referral of it to the District Attorney. Certainly this does not make appellants prospective defendants in criminal prosecutions such as, under the due process clause, would entitle them to the benefit of counsel. To determine whether a prospective defendant in a criminal prosecution is entitled to the benefit of counsel, one must first determine the remoteness or immediacy of that person becoming an actual defendant in a criminal case. Thus, if a person's chances of becoming an actual defendant are remote,

it can hardly be said that he is now a prospective defendant entitled to the presence of counsel. That is precisely the situation here. Assuming appellants become, at some future time, actual defendants in criminal prosecutions based primarily on the evidence adduced before appellee at the Additional Special Term, how would that come about? The procedure used thus far in this investigation has been as follows: After evidence has been presented to the appellee, he makes his findings and recommendations based on that evidence. These findings and recommendations are then presented to the Appellate Division. Should the Appellate Division believe that the matters presented to it warrant consideration by the District Attorney, the Appellate Division passes a resolution giving the appellee and counsel for the Judicial Inquiry authority, if they deem it advisable, to present the matters to the District Attorney for his consideration. Should appellee and counsel for the Judicial Inquiry present the matters to the District Attorney, then the latter must decide whether they warrant presentation to a grand jury. If he does present them to a grand jury it finally happens that the person involved becomes a prospective defendant because, after all, the grand jury may fail to indict.

In these circumstances, while before the appellee, the possibility of appellants becoming actual defendants in criminal prosecutions is so remote that it is clear that the due process clause of the Fourteenth Amendment remains inviolate despite the fact that the appellants are not permitted the presence of counsel while being examined as witnesses at the Additional Special Term. Certainly appellants' danger is less imminent than that of the appellants in *Matter of Groban, supra*. Nor for that matter is the appellants' position any stronger than that of the petitioners in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504. In the two last cited cases, it was held that it is not violative of the due process clause of the Fourteenth Amendment for a state to deny counsel to murder defendants for a period of from 12 to 14 hours after being taken into

police custody during which time they voluntarily confessed to the murders. As was noted in the *Cicenia* case (357 U. S. at 510, fn. 4) the state involved (New Jersey) has no requirement that a man be represented by counsel between the time of arrest and arraignment. The same is true in New York State (Sections 188, 189, 190, Code of Criminal Procedure, McKinney's Consolidated Laws of New York, Book 66). In the *Groban, Crooker* and *Cicenia* cases the chances of the persons there becoming actual defendants in criminal prosecutions were real. By comparison, the instant appellants' chances of becoming actual defendants are more illusory than real.

In any event, there is no question but that the appellants here could have invoked the privilege against self-incrimination. This was, in fact, one of the underlying reasons for the decision in *Matter of Groban,* and it is a more impelling reason here. *Matter of Groban, supra,* 336-337 (Concurring Opinion of Mr. Justice Frankfurter). Appellants contend that because of what was told to them by the Judicial Inquiry attorney, as his personal opinion, they are prospective defendants entitled to the presence of counsel while being examined as witnesses before appellee at the Additional Special Term. But appellants were furnished with this private opinion, at their own request, four and one half months before they were called to testify as witnesses, and they were given the opinion in the presence of their attorney. Surely, in these circumstances, leaving appellants to invoke the privilege against self-incrimination is in accordance with due process. Appellants cannot validly contend that they need the presence of counsel, while being examined as witnesses, to advise them of their right to invoke the privilege against self-incrimination. They are persons licensed by the State of New York to practice as private detectives and investigators, and as such it must be assumed that they are possessed of a sufficient degree of intelligence to be able to understand the privilege. Moreover, appellants had ample time (four and a half months) within which to

discuss with their attorney the evidence possessed by the Judicial Inquiry before making their appearances as witnesses. Against such a background, appellants' plea that they need counsel to advise them as to the privilege against self-incrimination, must go unheeded especially since it comes "at a time when this privilege has attained the familiarity of the comic strips." *Matter of Groban, supra* at 337.

In view of the patent similarity between the instant appeal and *Matter of Groban,* the law on the question raised by appellants is settled, and therefore, the question is not one of such substantiality as to require a review by this Court.

CONCLUSION

The question sought to be reviewed by appellants was never raised in the New York State courts; the question that was raised is not a substantial federal question and therefore the appeal should be dismissed, or in the alternative a writ of certiorari should be denied.

Dated: October 16, 1958

Brooklyn, N. Y.

Respectfully submitted,

DENIS M. HURLEY,
Attorney and Counsel for Appellee.

MICHAEL CAPUTO,
On the Brief.

APPENDIX

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present: HON. GERALD NOLAN,

Presiding Justice,

" HENRY G. WENZEL, JR.,
" GEORGE J. BELDOCK,
" CHARLES E. MURPHY,
" HENRY L. UGHETTA,

Associate Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

NOW, THEREFORE, pursuant, to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made:

(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, AN ADDITIONAL SPECIAL TERM OF THE SUPREME COURT, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice GEORGE A. ARKWRIGHT, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that DENIS M. HURLEY, ESQ., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7); and it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

Enter,

GERALD NOLAN,
Presiding Justice.